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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 ROBERT ARISTO GALLARDO, III,) Civil No. 11cv02569 LAB (RBB)
12)
13) Petitioner,)
14)
15) v.) **REPORT AND RECOMMENDATION**
16) **DENYING PETITION FOR WRIT OF**
17) **HABEAS CORPUS [ECF NO. 1]**
18)
19) GEORGE NEOTTI,)
20)
21) Respondent.)
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24)
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27)
28)

17 Petitioner Robert Aristo Gallardo, III, a state prisoner
18 proceeding pro se, filed a Petition for Writ of Habeas Corpus on
19 November 3, 2011, pursuant to 28 U.S.C. § 2254 [ECF No. 1].
20 Gallardo claims that his sentence of "three potential life
21 sentences" violates the Eighth Amendment of the United States
22 Constitution because it is grossly disproportionate to the gravity
23 of his offenses. (Pet. 6, ECF No. 1.)¹

24 On January 18, 2012, Respondent George Neotti, warden of RJ
25 Donovan State Prison ("Donovan"), filed an "Answer to Petition for
26 Writ of Habeas Corpus and Memorandum of Points and Authorities in
27 _____
28

¹ Because Gallardo's Petition and Neotti's Answer are not consecutively paginated, the Court will cite to them using the page numbers assigned by the electronic case filing system.

1 Support" [ECF No. 5] along with a Notice of Lodgment [ECF No. 6].
2 Respondent asserts that Petitioner is not entitled to habeas
3 relief because the state courts' denials of his cruel and unusual
4 punishment claim were neither unreasonable determinations of the
5 facts, nor contrary to, or unreasonable applications of, clearly
6 established federal law. (Answer 13-14, ECF No. 5.) Neotti
7 argues that Gallardo's sentence does not shock the conscience and
8 is not out of proportion to the gravity of the violent crimes he
9 committed. (Id. at 16.) Petitioner did not file a traverse.

10 The Court has reviewed the Petition, Respondent's Answer, and
11 the lodgments. For the reasons stated below, the Petition for
12 Writ of Habeas Corpus [ECF No. 1] should be **DENIED**.

13 I. FACTUAL BACKGROUND

14 A. Prior Strikes

15 On February 15, 2002, Gallardo pleaded guilty to four counts
16 of first-degree robbery. (Lodgment No. 1, Clerk's Tr. vol. 1, 58-
17 60, 80, Feb. 15, 2002.) Petitioner admitted that he "took the
18 personal property of the victims by force and while armed with a
19 handgun." (Id. at 60.) He was sentenced to six years in prison.
20 (Id. at 80.)

21 B. Most Recent Convictions

22 Gallardo's most recent convictions stem from a series of
23 domestic disputes occurring in June 2008 involving Angelica E.,
24 the mother of Petitioner's then-infant daughter. (Lodgment No.
25 14, People v. Gallardo, No. D058810, slip op. at 5-6 (Cal. Ct.
26 App. Oct. 6, 2011).) Gallardo had been in an intimate
27 relationship with Angelica for approximately eight months when, in
28 October 2007, his parole was revoked and he returned to prison.

1 (Id. at 5.) Angelica gave birth to the couple's child in February
2 of 2008. (Id.) Petitioner was released from prison in May of
3 that year; at that time, Angelica and the infant were living with
4 another man. (Id.) Angelica carried on an intimate relationship
5 with both men once Gallardo was released from prison. (Id.)

6 On June 8, 2008, Petitioner and Angelica got into a physical
7 altercation with each other at the beach. (Id.) He complained
8 about her relationship with the other man and accused her of not
9 properly caring for Gallardo's child. (Id.) Angelica responded
10 by slapping Petitioner in the face. (Id.) "Gallardo then slapped
11 her twice in the face fairly hard with an open hand, causing her
12 to see stars and suffer a cut and bruised lip." (Id.)

13 The next day, Petitioner and Angelica had another violent
14 exchange at the home of one of Gallardo's former girlfriends,
15 where he was staying at the time. (Id. at 5-6.) During the
16 argument, Petitioner grabbed Angelica by the hair, threw her to
17 the ground, slapped her head, and kicked her while she was on the
18 ground. (Id.) "As Angelica stood up, Gallardo grabbed a yellow
19 rope and wrapped it around her neck from behind, squeezing it
20 tight until she fell backward to the floor on top of him and
21 passed out." (Id. at 6.) When Angelica awoke, Petitioner choked
22 her again until she lost consciousness. (Id.) When she regained
23 consciousness and attempted to leave the home, Gallardo physically
24 prevented her from escaping. (Id.)

25 Petitioner later permitted Angelica to leave for work. (Id.)
26 When she arrived at work, Angelica informed her supervisor that
27 Gallardo tried to strangle her. (Id.) The police were called and
28 Petitioner was arrested. (Id.) While in custody, Gallardo

1 escaped from a police officer's patrol vehicle, but was found
2 several days later hiding out at a friend's home. (Id.)

3 II. PROCEDURAL BACKGROUND

4 On June 5, 2009, in the Superior Court of California, County
5 of San Diego, a jury convicted Gallardo of (1) assault with a
6 deadly weapon or force likely to cause great bodily injury (count
7 two); (2) two counts of corporal injury to the mother of his child
8 (counts four and six); (3) false imprisonment (count five); and
9 (4) escape from arrest (count seven). (Lodgment No. 1, Clerk's
10 Tr. vol. 1, 226, 228-31, June 5, 2009.) The jury found that
11 Petitioner used a deadly weapon (a rope) in the commission of the
12 assault and the corporal injury to the mother of his child. (Id.
13 at 226, 228.) The trial court also determined that Gallardo had
14 previously been convicted of four serious or violent felonies
15 within the meaning of California Penal Code §§ 667(b)-(i) and
16 1170.12, one serious felony prior within the meaning of California
17 Penal Code § 667(a)(1), and one felony for which he served a
18 separate prison term within the meaning of California Penal Code §
19 667.5(b). (Lodgment No. 3, Rep.'s Tr. vol. 10, 1119-21, June 5,
20 2009.)

21 The trial court granted Petitioner's request to strike all
22 prior convictions as to one of the corporal injury counts (count
23 six). (Id. vol. 11, 1144-45, July 8, 2009.) The court declined,
24 however, to strike any prior convictions as to the other counts
25 (counts two, four, and five). (Id. at 1143-44.) Gallardo was
26 sentenced to twenty-five years to life plus seven years in state
27 prison. (Lodgment No. 1, Clerk's Tr. vol. 1, 141, July 8, 2009.)
28 This sentence was comprised of (1) twenty-five years to life for

1 one of the corporal injury convictions (count four), pursuant to
2 California's three-strikes law; (2) one year for the weapon use
3 enhancement as to that count; (3) one year for the other corporal
4 injury conviction; and (4) five years for the prior serious felony
5 enhancement. (Id. at 140, 142; Lodgment No. 3, Rep.'s Tr. vol.
6 11, 1145-46.) Sentencing was stayed as to the assault conviction,
7 the false imprisonment conviction, and the prior prison term
8 enhancement. (Id.)²

9 Gallardo appealed the convictions on November 19, 2009,
10 arguing that (1) the trial court abused its discretion when it
11 refused to strike all but one of his prior strikes; and (2)
12 Petitioner's three indeterminate sentences of twenty-five years to
13 life constitute cruel and unusual punishment because the
14 "sentences" are disproportionate to his offenses. (Lodgment No.
15 4, Appellant's Opening Brief at 13, 22, People v. Gallardo, No.
16 D055505 (Cal. Ct. App. Aug. 23, 2010).) On appeal, the People
17 requested a limited remand for the trial court to select and
18 impose a "full strength sentence" for count six and to correct
19 various sentencing errors in the judgment and abstract of
20 judgment. (Lodgment No. 5, Respondent's Brief at 36, People v.
21 Gallardo, No. D055505 (Cal. Ct. App. Aug. 23, 2010).)

22 On August 23, 2010, Division One of the California Court of
23 Appeal, Fourth Appellate District, held that the trial court did
24 not abuse its discretion in declining to strike all but one of
25 Gallardo's prior convictions. (Lodgment No. 7, People v.

26
27 ² There is a discrepancy between the Clerk's Transcript and
28 the Reporter's Transcript regarding staying the prior prison term
enhancement, which was addressed on remand. (See Lodgment No. 11,
Rep.'s Tr. vol. 1, 12-14, Dec. 13, 2010.)

1 Gallardo, No. D055505, slip op. at 9, 12 (Cal. Ct. App. Aug. 23,
2 2010).) The court also determined that Petitioner's sentence was
3 not cruel or unusual. (Id. at 12-13, 18.) The court of appeal
4 concluded, however, that the trial court imposed an unauthorized
5 sentence when it failed to select and impose a full strength
6 sentence as to count six. (Id. at 18-21.) The court noted that
7 additional errors were made as to the judgment and abstract of
8 judgment. (Id. 21-23.) The case was remanded to the superior
9 court for resentencing and to correct the errors. (Id. at 23.)

10 Gallardo petitioned the California Supreme Court for review
11 on September 30, 2010. (Lodgment No. 8, Petition for Review,
12 People v. Gallardo, No. SD2009702703 (Cal. Nov. 10, 2010).) On
13 November 10, 2010, the California Supreme Court denied the
14 petition without opinion. (Lodgment No. 9, People v. Gallardo,
15 No. S186853, order at 1 (Cal. Nov. 10, 2010).)

16 Pursuant to the remand, a new sentencing hearing was
17 conducted on December 13, 2010. (Lodgment No. 11, Rep.'s Tr. vol.
18 1, 1.) Again, the court struck Petitioner's prior strikes as to
19 count six. (Id. at 12.) The court also denied Gallardo's renewed
20 request to strike the prior strikes as to the other counts. (Id.)
21 Petitioner was resentenced to twenty-five years to life plus nine
22 years, with the possibility of parole. (See Lodgment No. 10,
23 Clerk's Tr. vol. 1, 1-3, Dec. 13, 2010.) This sentence consisted
24 of (1) twenty-five years to life for one of the corporal injury
25 counts (count four); (2) a one-year weapon use enhancement as to
26 that count; (3) three years for the other corporal injury count
27 (count six); and (4) five years for a prior conviction
28 enhancement. (Id. at 1, 3.) Sentencing was stayed as to the

1 assault and false imprisonment convictions (counts two and five).
2 (Id. at 1.) Gallardo's sentence consisted of an indeterminate
3 term of thirty-one years to life plus a "full strength consecutive
4 determinate term of three years." (See Lodgment No. 14, People v.
5 Gallardo, No. D058810, slip op. at 3.)

6 On April 8, 2011, Gallardo appealed and raised the same two
7 claims contained in his prior appeal; on October 6, 2011, Division
8 One of California's Fourth Appellate District affirmed the
9 judgment. (Lodgment No. 12, Appellant's Opening Brief at 5, 7,
10 People v. Gallardo, No. D058810 (Cal. Ct. App. Oct. 6, 2011);
11 Lodgment No. 14, People v. Gallardo, No. D058810, slip op. at 1,
12 16.) Petitioner filed another petition for review in the
13 California Supreme Court; it was denied without opinion on
14 December 21, 2011. (Lodgment No. 15, Petition for Review, People
15 v. Gallardo, No. SD2011700636 (Cal. Dec. 21, 2011); Lodgment No.
16 16, People v. Gallardo, No. S197900, order at 1 (Cal. Dec. 21,
17 2011).)

18 Gallardo then submitted a Petition for Writ of Habeas Corpus
19 to this Court on November 3, 2011 [ECF No. 1]. Neotti filed an
20 Answer on January 18, 2012 [ECF No. 5]. Petitioner did not file a
21 traverse.

22 III. STANDARD OF REVIEW

23 The Antiterrorism and Effective Death Penalty Act ("AEDPA"),
24 28 U.S.C. § 2244, applies to all federal habeas petitions filed
25 after April 24, 1996. Woodford v. Garceau, 538 U.S. 202, 204
26 (2003) (citing Lindh v. Murphy, 521 U.S. 320, 326 (1997)). AEDPA
27 sets forth the scope of review for federal habeas corpus claims:
28

1 The Supreme Court, a Justice thereof, a circuit
 2 judge, or a district court shall entertain an
 3 application for a writ of habeas corpus in behalf of a
 4 person in custody pursuant to the judgment of a State
 court only on the ground that he is in custody in
 violation of the Constitution or laws or treaties of the
 United States.

5 28 U.S.C. § 2254(a); see also Reed v. Farley, 512 U.S. 339, 347
 6 (1994); Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir. 1991).

7 Because Gallardo's Petition was filed on November 3, 2011, AEDPA
 8 applies to this case. See Woodford, 538 U.S. at 204.

9 In 1996, Congress "worked substantial changes to the law of
 10 habeas corpus." Moore v. Calderon, 108 F.3d 261, 263 (9th Cir.
 11 1997). Amended § 2254(d) now reads:

12 An application for a writ of habeas corpus on
 13 behalf of a person in custody pursuant to the judgment
 14 of a State court shall not be granted with respect to
 any claim that was adjudicated on the merits in State
 court proceedings unless the adjudication of the
 claim --

15 (1) resulted in a decision that was contrary
 16 to, or involved an unreasonable application
 17 of, clearly established Federal law, as
 determined by the Supreme Court of the United
 States; or

18 (2) resulted in a decision that was based on
 19 an unreasonable determination of the facts in
 20 light of the evidence presented in the State
 court proceeding.

21 28 U.S.C. § 2254(d).

22 To present a cognizable federal habeas corpus claim, a state
 23 prisoner must allege that his conviction was obtained "in
 24 violation of the Constitution or laws or treaties of the United
 25 States." 28 U.S.C. § 2254(a). A petitioner must allege that the
 26 state court violated his federal constitutional rights.
 27 Hernandez, 930 F.2d at 719; Jackson v. Ylst, 921 F.2d 882, 885
 28

1 (9th Cir. 1990); Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir.
2 1988).

3 A federal district court does "not sit as a 'super' state
4 supreme court" with general supervisory authority over the proper
5 application of state law. Smith v. McCotter, 786 F.2d 697, 700
6 (5th Cir. 1986); see also Lewis v. Jeffers, 497 U.S. 764, 780
7 (1990) (holding that federal habeas courts must respect a state
8 court's application of state law); Jackson, 921 F.2d at 885
9 (explaining that federal courts have no authority to review a
10 state's application of its law). Federal courts may grant habeas
11 relief only to correct errors of federal constitutional magnitude.
12 Oxborrow v. Eikenberry, 877 F.2d 1395, 1400 (9th Cir. 1989)
13 (stating that federal courts are not concerned with errors of
14 state law unless they rise to level of a constitutional
15 violation).

16 The Supreme Court, in Lockyer v. Andrade, 538 U.S. 63
17 (2003), stated that "AEDPA does not require a federal habeas court
18 to adopt any one methodology in deciding the only question that
19 matters under § 2254(d)(1) -- whether a state court decision is
20 contrary to, or involved an unreasonable application of, clearly
21 established Federal law." Id. at 71 (citation omitted). In other
22 words, a federal court is not required to review the state court
23 decision de novo. Id. Rather, a federal court can proceed
24 directly to the reasonableness analysis under § 2254(d)(1). Id.

25 The "novelty" in § 2254(d)(1) is "the reference to 'Federal
26 law, as determined by the Supreme Court of the United States.'" Lindh v. Murphy, 96 F.3d 856, 869 (7th Cir. 1996) (en banc), rev'd
27 on other grounds, 521 U.S. 320 (1997). Section 2254(d)(1)
28

1 "explicitly identifies only the Supreme Court as the font of
2 'clearly established' rules." Id. "A state court decision may
3 not be overturned on habeas review, for example, because of a
4 conflict with Ninth Circuit-based law" Moore, 108 F.3d at
5 264. "[A] writ may issue only when the state court decision is
6 'contrary to, or involved an unreasonable application of,' an
7 authoritative decision of the Supreme Court." Id. (citing
8 Childress v. Johnson, 103 F.3d 1221, 1225 (5th Cir. 1997); Devin
9 v. DeTella, 101 F.3d 1206, 1208 (7th Cir. 1996); Baylor v.
10 Estelle, 94 F.3d 1321, 1325 (9th Cir. 1996)).

11 Furthermore, with respect to the factual findings of the
12 trial court, AEDPA provides:

13 In a proceeding instituted by an application for a
14 writ of habeas corpus by a person in custody pursuant to
15 the judgment of a State court, a determination of a
16 factual issue made by a State court shall be presumed to
be correct. The applicant shall have the burden of
rebutting the presumption of correctness by clear and
convincing evidence.

17 28 U.S.C. § 2254(e)(1).

18 IV. DISCUSSION

19 A. Whether Gallardo's Sentence Is Grossly Disproportionate

20 The sole issue presented in the Petition is whether
21 Gallardo's sentence of "three potential life sentences" violates
22 the Eighth Amendment of the United States Constitution. (See Pet.
23 6, ECF No. 1.) Specifically, Petitioner argues that his sentence
24 is grossly disproportionate to the gravity of his offenses. (Id.)

25 Gallardo contends that he has no serious criminal record.
26 (Id.) He asserts that he was previously convicted of one serious
27 felony, robbery, which involved four separate victims. (Id.)
28 According to Petitioner, these convictions were treated as a

1 "single incident" and no one was injured. (Id.) Gallardo states
2 that none of his prior convictions are for the same offenses that
3 are the subject of this proceeding. (Id.)

4 Petitioner represents that his sentence is more severe than
5 what "most people" receive for second-degree murder. (Id.) He
6 also maintains that typically the longest sentence imposed on
7 others for the same offense is four years. (Id.) Yet, Petitioner
8 urges that his punishment is five times longer than it would be if
9 he had no record. (Id.)

10 Nonetheless, Respondent argues that the state courts'
11 rejections of Gallardo's cruel and unusual punishment claim were
12 not based on unreasonable determinations of the facts, nor were
13 they contrary to, or an unreasonable application of, clearly
14 established Supreme Court law. (Answer 13-14, 17, ECF No. 5.) In
15 light of the relevant Supreme Court case law, Rummel v. Estelle,
16 445 U.S. 263 (1980), and Ewing v. California, 538 U.S. 11 (2003),
17 Neotti contends that Gallardo's sentence is not disproportionate
18 to the violent crimes he committed against Angelica. (Id. at 16.)
19 Further, Respondent notes that Petitioner's sentence includes the
20 possibility of parole. (Id. at 15.)

21 The Eighth Amendment mandates that "[e]xcessive bail shall
22 not be required, nor excessive fines imposed, nor cruel and
23 unusual punishments inflicted." U.S. Const. amend. VIII. "The
24 final clause prohibits not only barbaric punishments, but also
25 sentences that are disproportionate to the crime committed."
26 Solem v. Helm, 463 U.S. 277, 284 (1983). The Eighth Amendment
27 contains a "narrow" proportionality principle which forbids only
28 "extreme sentences that are 'grossly disproportionate' to the

1 crime"; it does not require "strict proportionality between crime
2 and sentence." Graham v. Florida, 560 U.S. ___, ___, 130 S. Ct.
3 2011, 2021 (2010) (citing Harmelin v. Michigan, 501 U.S. 957, 1001
4 (1991)).

5 "[O]ne governing legal principle emerges as 'clearly
6 established' under § 2254(d)(1): A gross disproportionality
7 principle is applicable to sentences for terms of years."
8 Lockyer, 538 U.S. at 72. The "'precise contours' of [the gross
9 disproportionality principle] 'are unclear[]'" and are "applicable
10 only in the 'exceedingly rare' and 'extreme' case." Id. at 72-73
11 (quoting Harmelin, 501 U.S. at 998 (Kennedy, J., concurring in
12 part and concurring in judgment)). Because of this, "[t]he gross
13 disproportionality principle reserves a constitutional violation
14 for only the extraordinary case." Id. at 77.

15 The Ninth Circuit has given courts some guidance as to the
16 kind of "exceedingly rare" Eighth Amendment claim that warrants
17 federal habeas relief. See Duhaime v. Ducharme, 200 F.3d 597, 600
18 (9th Cir. 2000) ("[Ninth Circuit] cases may be persuasive
19 authority for purposes of determining whether a particular state
20 court decision is an 'unreasonable application' of Supreme Court
21 law, and also may help us determine what law is 'clearly
22 established.'"). In two recent cases, the Ninth Circuit has
23 overturned three-strikes sentences where either the triggering
24 offense or the defendant's prior criminal history were not
25 sufficiently serious.

26 In Ramirez v. Castro, 365 F.3d 755, 775 (9th Cir. 2004), the
27 court concluded that a sentence of twenty-five years to life for a
28 nonviolent shoplifting of a \$199.00 VCR where the defendant's

1 prior convictions were two nonviolent second degree robberies,
2 violated the Eighth Amendment. More recently, the Ninth Circuit
3 struck down a sentence of twenty-eight years to life imposed on a
4 defendant who had failed to update his sex offender registration
5 within five days of his birthday. Gonzalez v. Duncan, 551 F.3d
6 875, 876, 891 (9th Cir. 2008).

7 The Ninth Circuit has upheld three-strikes sentences,
8 however, in cases where either the triggering offense or the
9 defendant's prior record involves violence or the threat of
10 violence. In Rios v. Garcia, 390 F.3d 1082 (9th Cir. 2004), the
11 court concluded that a sentence of twenty-five years to life for a
12 conviction for a felony petty theft did not violate the Eighth
13 Amendment because Rios's prior robbery "strikes" involved the
14 threat of violence; he "[had] a lengthy criminal history,
15 beginning in 1982, and he ha[d] been incarcerated several times."
16 Id. at 1086. In Taylor v. Lewis, 460 F.3d 1093 (9th Cir. 2006),
17 the court upheld a sentence of twenty-five years to life for
18 felony possession of cocaine and misdemeanor possession of drug
19 paraphenalia. Although the triggering felony was nonviolent,
20 Taylor's prior convictions included second-degree burglary,
21 robbery with a firearm, and voluntary manslaughter with the use of
22 a weapon. Id. at 1100.

23 When reviewing a state court decision, federal courts must
24 look to the last reasoned state court decision as the basis of the
25 judgment. Polk v. Sandoval, 503 F.3d 903, 909 (9th Cir. 2007)
26 (citing Benson v. Terhune, 304 F.3d 874, 880 n.5 (9th Cir. 2002)).
27 The last state court to address the merits of Petitioner's Eighth
28 Amendment claim was the California Court of Appeal. (See Lodgment

1 No. 14, People v. Gallardo, No. D058810, slip op. at 10-15.) This
2 Court reviews that decision. See Ylst v. Nunnemaker, 501 U.S.
3 797, 806 (1991).

4 The appellate court rejected Gallardo's argument that his
5 sentence constitutes cruel and unusual punishment. (Lodgment No.
6 14, People v. Gallardo, No. D058810, slip op. at 10, 15.) The
7 court first addressed Petitioner's contention that his sentence
8 was five times longer than the four-year sentence that a first-
9 time offender would receive and more than most people would
10 receive for second-degree murder. (Id. at 10.) Contrary to
11 Gallardo's characterization of his sentence as "three
12 indeterminate 25-year-to-life terms[,] " the court held that
13 Petitioner was only subject to serving one sentence of twenty-five
14 years to life for count four because the trial court stayed his
15 sentences for counts two and five pursuant to California Penal
16 Code § 654. (Id.) The court also stated that Gallardo failed to
17 appreciate that he had qualifying priors that triggered the
18 mandatory sentence of twenty-five years to life under the three-
19 strikes law. (Id.) "Thus it is as a recidivist felon that
20 Gallardo is being punished and not as a theoretical first time
21 offender for whom he bases most of his arguments." (Id. at 10-
22 11.)

23 The court held that in addition to his most recent
24 convictions, Petitioner was previously convicted of armed robbery.
25 (Id. at 13.) Armed robbery, the court noted, is serious and has a
26 "tremendous potential for injury or death." (Id.) The court also
27 stated that at the time of his most recent sentencing, Gallardo
28 "had already suffered four prior serious felony convictions,

1 served a six-year prison term, plus additional prison time for
2 revocation of parole." (Id. at 14.) Further, Petitioner
3 committed his most recent offenses while on parole, evidencing
4 that he "has no intention of abiding by the laws of the State of
5 California." (Id.) In light of Gallardo's recidivist behavior,
6 the appellate court determined that his sentence was not so
7 disproportionate to his crimes as to violate the Constitution.
8 (Id. at 15.)

9 When inquiring whether a sentence is grossly disproportionate
10 under a recidivist sentencing statute, courts look to whether an
11 "extreme sentence is justified by the gravity of [an individual's]
12 most recent offense and criminal history." Ramirez, 365 F.3d at
13 768. A court must consider the "factual specifics" of the
14 triggering offense and the individual's priors to determine
15 whether the conduct involved violence or was particularly serious.
16 See Reyes v. Brown, 399 F.3d 964, 969 (9th Cir. 2005).

17 Here, Gallardo's felony convictions include (1) four
18 convictions for robbery "by force and while armed with a handgun";
19 (2) one conviction for striking the mother of his child in the
20 face; and (3) two convictions for choking the mother of his child
21 with a rope to the point of unconsciousness. (See Lodgment No. 1,
22 Clerk's Tr. vol. 1, 58-60; Lodgment No. 14, People v. Gallardo,
23 No. D058810, slip op. at 5-6.) The exceptionally violent nature
24 of these acts weighs strongly against any finding of
25 disproportionality. See Solem, 463 U.S. at 292-93 ("[N]onviolent
26 crimes are less serious than crimes marked by violence or the
27 threat of violence."). Petitioner's offenses are serious in
28 nature and will likely have long-lasting effects on his victims.

1 The dangerousness of Gallardo's conduct is not ameliorated by the
2 fact that "no one was injured" when he robbed four people at
3 gunpoint. (See Pet. 6, ECF No. 1.) Physical injury to a victim
4 is not required for an offense to be considered serious for
5 purposes of the gross disproportionality principle. See Solem,
6 463 U.S. at 292-93 (noting that acts involving threats of violence
7 are serious).

8 Moreover, Petitioner's most recent convictions bear a
9 rational relationship to his propensity to recidivate. See Solem,
10 463 U.S. at 296 (noting that states are justified in punishing a
11 recidivist more severely than a first-time offender); see
12 Gonzalez, 551 F.3d at 886-87 (noting that a petitioner's
13 propensity to recidivate is a factor to consider under the gross
14 disproportionality test). Gallardo's priors were for similarly
15 violent conduct, evidencing his propensity to recidivate when it
16 comes to acts of violence against others. See Ewing 538 U.S. at
17 31-32 (Scalia, J., concurring in judgment) (holding that a
18 recidivist offender's sentence of twenty-five years to life for
19 the theft of three golf clubs did not warrant habeas relief);
20 Rummel, 445 U.S. at 285 (concluding that a recidivist offender's
21 sentence of life in prison for stealing \$120.75 by false pretenses
22 did not warrant habeas relief). Moreover, as the California Court
23 of Appeal noted, Petitioner was on parole when he committed the
24 offenses against Angelica. (Lodgment No. 14, People v. Gallardo,
25 No. D058810, slip op. at 15.) California's interest in deterring
26 and incapacitating recidivist offenders justifies the severity of
27 Gallardo's sentence. See Ewing, 538 U.S. at 29-30; Gonzalez, 551
28 F.3d at 886.

1 Next, Gallardo argues that his prior armed robbery
2 convictions were "punished as a single incident [and] punished in
3 one case[.]" (Pet. 6, ECF No. 1.) On this basis, he appears to
4 contend that the state court's conclusion that he has a serious
5 criminal record is an unreasonable determination of the facts.
6 See 28 U.S.C.A. § 2254(d)(2). The gross disproportionality
7 principle is the only clearly established principle from the
8 Supreme Court's Eighth Amendment jurisprudence that applies to
9 Petitioner's claims. Lockyer, 538 U.S. at 72. Whether Gallardo's
10 prior convictions amount to a serious criminal record that can be
11 used to enhance his sentence under California's Three Strikes Law
12 is a matter of state law. See Saunders v. Almager, No. 09-0708
13 L(WMc), 2011 WL 2181320, at *10 (S.D. Cal. Apr. 27, 2011).
14 "Finally, 'for purposes of a Three Strikes sentence, the fact that
15 [the defendant's] prior convictions were adjudicated in a single
16 proceeding does not mean that they constitute one prior
17 conviction; two strikes can arise from one case.'" Id.
18 (alteration in original) (quoting Ramirez v. Castro, 365 F.3d at
19 758 n.3). Accordingly, on this basis, the state court's
20 resolution of Petitioner's claim is not contrary to, or an
21 unreasonable application of, an authoritative decision of the
22 Supreme Court or an unreasonable determination of the facts based
23 on the evidence presented in the state court proceedings.

24 Additionally, while Gallardo's sentence of thirty-four years
25 to life is a severe penalty, the harshness is mitigated by the
26 availability of parole. See Cocio v. Bramlett, 872 F.2d 889, 893
27 (9th Cir. 1989) (distinguishing the punishment imposed in Solem
28 from Rummel on the basis that Rummel's punishment included the

1 possibility of parole, making it less severe than that imposed in
2 Solem). Moreover, contrary to Petitioner's assertion, he does not
3 face "three potential life sentences[.]" (See Pet. 6, ECF No. 1.)
4 As the California Court of Appeal noted in its opinion, Gallardo's
5 sentences for counts two and five were stayed pursuant to
6 California Penal Code § 654 (prohibition against multiple
7 punishment). (See Lodgment No. 14, People v. Gallardo, No.
8 D058810, slip op. at 10.)

9 Given Petitioner's criminal history, coupled with the fact
10 that his current offenses are not "technical" violations of the
11 law, the Court cannot conclude that this is an "extremely rare"
12 case which gives rise to an inference of gross disproportionality.
13 See Ramirez, 365 F.3d at 770; see also Taylor, 460 F.3d at 1101-
14 02; Rios, 390 F.3d at 1086. Accordingly, the Court need not
15 compare Petitioner's sentence with sentences in this and other
16 jurisdictions. See Harmelin, 501 U.S. at 1004-05. The state
17 court's rejection of Gallardo's Eighth Amendment claim was neither
18 contrary to, nor an unreasonable application of, clearly
19 established Supreme Court law. See Williams v. Taylor, 529 U.S.
20 362, 412-13 (2000). Petitioner is not entitled to federal habeas
21 relief on his Eighth Amendment claim. It is recommended that
22 Gallardo's Petition be **DENIED**.

23 **B. Evidentiary Hearing**

24 In his Answer, Neotti argues that an evidentiary hearing is
25 not warranted because the state courts decided Petitioner's claims
26 on the merits. (Answer 17, ECF No. 5.) Yet, Gallardo does not
27 request an evidentiary hearing in his Petition. (See generally
28 Pet. 1, 6, ECF No. 1.) In any event, even if it had been

requested, an evidentiary hearing is not warranted. See Cullen v. Pinholster, __ U.S. __, __, 131 S. Ct. 1388, 1398 (2011); see also Phelps v. Alameida, 569 F.3d 1120, 1126 n.8 (9th Cir. 2009).

V. CONCLUSION AND RECOMMENDATION

The Court submits this Report and Recommendation to United States District Judge Larry A. Burns under 28 U.S.C. § 636(b)(1) and Local Civil Rule HC.2 of the United States District Court for the Southern District of California. For the reasons outlined above, **IT IS HEREBY RECOMMENDED** that the district court issue an Order (1) approving and adopting this Report and Recommendation and (2) directing that Judgment be entered denying the Petition.

IT IS ORDERED that no later than February 1, 2013, any party to this action may file written objections with the Court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections shall be filed with the Court and served on all parties no later than February 15, 2013. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. See Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156 (9th Cir. 1991).

IT IS SO ORDERED.

DATED: January 2, 2013


 Ruben B. Brooks
 United States Magistrate Judge

cc: Judge Burns
 All Parties of Record